

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Name LOWE MARK M
 (Last) (First) (Initial)

Prisoner Number F18836

Institutional Address CSP - Sacramento

P.O. Box 290666 Represa Calif 95676

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

MARK McCain LOWE
 (Enter the full name of plaintiff in this action.)

vs.

JIMMY Walker
Warden

(Enter the full name of respondent(s) or jailor in this action)

Case No. 0005
 (To be provided by the clerk of court)

**PETITION FOR A WRIT
 OF HABEAS CORPUS (PR)**

Read Comments Carefully Before Filling In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainees), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

1. What sentence are you challenging in this petition?

- (a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland):

CONTRA Costa County Superior Court MARTINEZ

Court

Location

- (b) Case number, if known 05-001460-5

- (c) Date and terms of sentence 585 Years to LIFE

- (d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes ☒ No ☐

Where?

Name of Institution: CSP - Sacramento

Address: P.O. Box Represq Calif 95671.

2. For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

Sex offenses, 27 Violations of Penal code section 288, subdivision (a) lewd act on a child

under 14, 12 Violations of section 288, subdivision (b)(1) (forcible lewd act on a child under 14) one

Violation of section 288.5 (continuous sexual abuse of a child under 14) and one violation of section 286, subdivision (c)(1) (Society of a child under 14) (§667.61, subd. (k)(1))

3. Did you have any of the following?

Arraignment: Yes ☒ No ☐

Preliminary Hearing: Yes ☐ No ☒

Motion to Suppress: Yes ☒ No ☐

4. How did you plead?

Guilty ☐ Not Guilty ☒ Nolo Contendere ☐

Any other plea (specify) _____

5. If you went to trial, what kind of trial did you have?

Jury ☒ Judge alone ☐ Judge alone on a transcript ☐

6. Did you testify at your trial? Yes ☐ No ☒

7. Did you have an attorney at the following proceedings:

(a) Arraignment Yes ☒ No ☐

(b) Preliminary hearing Yes ☐ No ☒

(c) Time of plea Yes ☒ No ☐

(d) Trial Yes ☒ No ☐

(e) Sentencing Yes ☒ No ☐

(f) Appeal Yes ☒ No ☐

(g) Other post-conviction proceeding Yes ☒ No ☐

8. Did you appeal your conviction? Yes ☒ No ☐

(a) If you did, to what court(s) did you appeal?

Court of Appeal Yes ☒ No ☐

Year: 2005 Result: Denied

Supreme Court of California Yes ☒ No ☐

Year: 2007 Result: Denied

Any other court Yes ☐ No ☒

Year: _____ Result: _____

(b) If you appealed, were the grounds the same as those that you are raising in this

Yes ~~X~~ No

Yes X No

Yes _____ No X

Yes ☒ No ☐

(a) If you sought relief in any proceeding other than an appeal, answer the following questions for each proceeding. Attach extra paper if you need more space.

Type of Proceeding: Petition for review

Result: Denied Date of Result: 11-28-07

Type of Proceeding: _____

PET. FOR WRIT OF HAB. CORPUS - 4 -

1 a. _____
2 b. _____
3 c. _____
4 d. _____
5 Result: _____ Date of Result: _____

6 III. Name of Court: _____
7 Type of Proceeding: _____
8 Grounds raised (Be brief but specific):
9 a. _____
10 b. _____
11 c. _____
12 d. _____
13 Result: _____ Date of Result: _____

14 IV. Name of Court: _____
15 Type of Proceeding: _____
16 Grounds raised (Be brief but specific):
17 a. _____
18 b. _____
19 c. _____
20 d. _____
21 Result: _____ Date of Result: _____

22 (b) Is any petition, appeal or other post-conviction proceeding now pending in any court?
23 Yes _____ No X

24 Name and location of court: _____

25 B. GROUNDS FOR RELIEF

26 State briefly every reason that you believe you are being confined unlawfully. Give facts to
27 support each claim. For example, what legal right or privilege were you denied? What happened?
28 Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

1 need more space. Answer the same questions for each claim.

2 [Note: You must present ALL your claims in your first federal habeas petition. Subsequent
3 petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant,
4 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

5 Claim One: The Trial Court's finding that Petitioner was competent was
6 not supported by substantial evidence.

7 Supporting Facts: The court totally ignored NAPA State Records, The court
8 totally disregarded the preponderance of evidence, the court expressed
9 doubt in the confidence of the testing results obtained by defense
10 experts believing them to be the exercise of judgment, that was very much

11 Claim Two: Testimony concerning child sexual abuse was erroneously
12 admitted. CSAAS, child sexual abuse Accommodation Syndrome.

13 Supporting Facts: Defense Counsel's failure to lodge all objections to expert
14 testimony on CSAAS was ineffective assistance of counsel, petitioner
15 contends that the wrongful admission of the CSAAS evidence was so
16 fundamentally unfair as to deprive him of his federal constitutional

17 Claim Three: The Cunningham error in this case was not
18 harmless.

19 Supporting Facts: Petitioner was sentenced under California's determinate
20 sentencing law (DSL) as to counts 5 and 41. The reviewing court agreed
21 there was error under Cunningham v. California (2007) 549 U.S. — 127
22 S.Ct. 856 166 L.Ed. 2d 856] but found it harmless under this court's

23 If any of these grounds was not previously presented to any other court, state briefly which
24 grounds were not presented and why:

25 _____

26 _____

27 _____

28 _____

List, by name and citation only, any cases that you think are close factually to yours so that they are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning of these cases:

¹³⁶⁸
Penal Code section 1367; Pate V. Robinson (1966) 383 U.S. 375, 378.) Pate, supra 383 U.S.
at p. 377; People V. Hayes (1999) 21 CAL. 4th 1211, 1281.) People V. Samuel, supra, 29
Cal. 3d at p. 505; People V. Pennington (1967) 66 CAL. 2d 508, 521.)

Do you have an attorney for this petition?

Yes ☐

No ☒

If you do, give the name and address of your attorney:

WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

Executed on 12-20-07

Date

Mark McCain Love

Signature of Petitioner

(Rev. 6/02)

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B. Grounds for relief, continued from page 5 to 6 For writ of Habeas Corpus.

cont.

From claim one,

Skewed and Bias, The court was bias in believing that defendant could assist counsel, counsel in the conduct of a defense, in a rational manner penal code section (1367) An incompetent defendant may not be tried or punished. Therefore the trial court could not have found him competent to stand trial, This error is prejudicial per se and the judgement of conviction must be Reversed.

cont.

From claim Two

^{right's}
To a Fair trial. The fact that the Jury heard the prescribed limiting instruction on this subject could not dispel the prejudice flowing from the admission of CSAAS evidence. CSAAS is Junk science, rejected by the scientific community as well as its very creator, Dr. Roland Summit. It has been rejected as a diagnostic ~~tool~~ by the American psychiatric Association's Diagnostic and statistical manual (DSM IV). It has been rejected by the relevant scientific community as a diagnostic tool for making child sexual abuse determinations. Brys J. Chadwick, D. (1993) The error in admitting CSAAS evidence requires reversal.

cont.

From claim three

recent decision in People v. Sandoval (2007) 41 Cal. 4th 825. The error cannot be deemed harmless under the federal constitutional standard of Chapman v. California, Supra as applied in Washington v. Recuenco (2006) 548 U.S. — [126 S. Ct. 2977, 165 L. Ed. 2d 983], which unquestionably applies to this case of federal constitutional error. The reviewing

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Court found that the defendant's Sixth Amendment rights were violated by the imposition of the upper term sentences. It is also a True Fact that defendant had no prior criminal convictions. In any event, the violations of Cunningham cannot themselves be deemed harmless, as they amounted to a complete deprivation of not only a jury trial and proof beyond a reasonable doubt, but also in the accusatory pleading. Thus, the Cunningham error cannot be harmless. The defendant's rights set forth by the reviewing court stated in Apprendi (Apprendi v. New Jersey (2000) 530 U.S. 466); Blakely (Blakely v. Washington (2004) 542 U.S. 296) and Cunningham (Cunningham v. California (2007) 549 U.S. — [127 S. Ct. 856, 166 L. Ed. 2d 856]) were violated by imposition of the upper term sentences on counts 5 and 41.

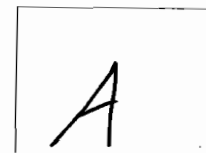
Continued From page 7 for writ of HAB. Corpus on List by name and citation only, any cases that you think are close factually to yours so that they are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning of these cases.

(People v. Rells (2000) 22 Cal. 4th 860, 867-868.) (People v. Turner (1984) 37 Cal. 3d 302, 312; People v. Greenberger (1997) 58 Cal. App. 4th 298, 336.)³ People v. Bassett (1968) 69 Cal. 2d 122, 141; People v. Marks, supra, 31 Cal. 4th at p. 269.)

(Kelly supra, 17 Cal. 3d at p. 30.) (Bowker, supra, 203 Cal. App. 3d at pp. 393-394.) People v. Robbie (2001) 92 Cal. App. 4th 1075, Commonwealth v. Dunkle (1992 Pa.) 602 A.2d 830, 529 Pa. 168, Evidence Code Section 801, Newkirk v. Commonwealth (1977 Ky.) 937 S.W.2d 690, 693-696.) (People v. Turner (1990) 50 Cal. 3d 668, 703; People v. Chavez (1980) 26 Cal. 3d 334, 350, n. 5.) Strickland v. Washington (1984) 466 U.S. 668, 689-690. (McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378, Clark v. Duckworth (7th Cir. 1990) 906 F.2d 1174. Chapman v. California (1967) 386 U.S. 18, 24. (Watson supra, 46 Cal. 2d at p. 836.) (People v. Brydson (1998) 63 Cal. App. 4th 159, 184), Richardson v. Marsh (1987) 481 U.S. 200, 208.) People v. Shymonovitz (9th Cir. 1998) 157 F. 3d 1154, 1161

(DSL) Sandoval, 41 Cal. 4th at p. 838.)
 (DSL) 95 to counts 5 and 41. The reviewing court agreed there was error under Cunningham v. California (2007) 549 U.S. — [127 S. Ct. 856, 166 L. Ed. 2d 856] People v. Sandoval (2007) 41 Cal. 4th 825. Chapman v. California, supra, Washington v. Recuenco (2006) 548 U.S. — [126 S. Ct. 2977, 165 L. Ed. 2d 983], Sullivan v. Louisiana (1993) 508 U.S. 275, 279-280.) Striome v. United States (1960) 361 U.S. 212, 217; McCormick v. United States (1991) 500 U.S. 257, 267-270; (Lankford v. Idaho (1991) 500 U.S. 110, 126-127.) (U.S. CONST. Art. VI, cl. 2; Delmonico v. Wilson (1992) 1 CAL. 4th 1009, 1023; Cooper v. Aaron (1958) 358 U.S. 1, 18.)

EXHIBIT COVER PAGE



EXHIBIT

Description of this Exhibit:

Number of pages to this Exhibit: 1 pages.

JURISDICTION: (Check only one)

☐

Municipal Court

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Superior Court

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Appellate Court

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State Supreme Court

☒

United States District Court

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State Circuit Court

☐

United States Supreme Court

☐

Grand Jury

Exhibit A.

Court of Appeal, First Appellate District, Div. 1 - No. A112739
S157486

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

MARK MCCAIN LOWE, Defendant and Appellant.

The petition for review is denied.

SUPREME COURT
FILED

NOV 28 2007

Frederick K. Ohlrich Clerk

Deputy

GEORGE

Chief Justice